MALAYAN BANKING BHD v. MOHD AFFANDI AHMAD & ANOR

FEDERAL COURT, PUTRAJAYA
ZABARIAH MOHD YUSOF FCJ
HASNAH MOHAMMED HASHIM FCJ
NORDIN HASSAN FCJ
[CIVIL APPEAL NO: 02(f)-5-03-2024 (J)]
4 OCTOBER 2024

Abstract – *A subsequent purchaser in good faith under the Torrens system is protected, even if they are negligent in their due diligence, as long as they rely on the conclusive nature of the registered title and have no notice of any adverse claims. A bank (or any subsequent purchaser) may rely on the registered title of a property and is not required to conduct extensive investigations into the history of the property or the validity of prior transactions, as long as there are no obvious signs of fraud or adverse claims.*

LAND LAW: *Sale and purchase of property – Subsequent purchaser – Bona fide – Lands sold and transferred – Registered owner/proprietor charged lands to bank as security for banking facilities – Allegations that transfers and charge null and void – Contractual representation that chargor legal and beneficial owner of property – No notice of any adverse claim to property – Whether incumbent on bank to investigate if there is any illegality to sale and purchase agreement ('SPA') – Whether bank must show that it was impossible for it to have known of unlawfulness of sale and purchase transaction even after proper examination and verification of SPA documents between vendor and chargor in order to qualify as subsequent purchaser in good faith – Whether bank must critically look into documentation and transactional documents leading up to sale and purchase of properties even though sale and purchase transaction has been completed and title transferred and registered in order to qualify as subsequent purchaser in good faith – Measure of extent of good faith and/or bona fide required of purchaser – Conflicting decisions in Bayangan Sepadu Sdn Bhd v. Jabatan Pengairan Dan Saliran Negeri Selangor & Ors and Au Meng Nam & Anor v. Ung Yak Chew & Ors – Whether burden of proving valuable consideration of subsequent purchaser extended to proving that valuable consideration had passed between immediate purchaser and vendor – National Land Code, s. 340(3)*

This was the appellant bank's ('third defendant') appeal against the decision of the Court of Appeal in dismissing its appeal against the High Court's order which held that the charge created in favour of the third defendant over the subject lands was null and void. The dispute between the parties concerned four lots of land, *ie*, Lots 430, 60, 97 and 716 ('four lots'), but the present appeal only pertained to Lots 97 and 716 ('two lots'). The respondents

('plaintiffs') were the administrators/executors of the estate of one Ahmad bin Buang ('deceased'). The first and second defendants (in the High Court) were property developers. The plaintiffs claimed that they were the beneficial owners of the four lots, having inherited them from the deceased. Despite the deceased having made the full payment, the four lots were never registered in his name but remained registered under the first defendant's name. The first defendant subsequently sold and transferred the two lots to the second defendant *vide* a SPA. The second defendant was subsequently registered as the owner of the two lots in the register titles and the two lots were subsequently charged to the third defendant as security for banking facilities granted by the third defendant to the second defendant. The plaintiffs contended that the transfers of the two lots to the second defendant were null and void, along with the charges registered by the second defendant, in favour of the third defendant. In the High Court, (i) the plaintiffs sought relief as to the ownership of the four lots; (ii) the first defendant counterclaimed for vacant possession of the lots and damages for nullifying the SPAs; and (iii) the second defendant sought damages in the amount of the value or selling price of the lots, including legal costs involved in the transfer of those lots. The High Court held that the plaintiffs had successfully proven their claim against the defendants while the counterclaim by the first and second defendants were dismissed. Aggrieved by the decision of the High Court, the second and third defendants appealed to the Court of Appeal. Both appeals were dismissed and the decision of the High Court was affirmed. Hence, the present appeal by the third defendant. The questions of law that arose were: (i) where there was contractual representation that the chargor was the legal and beneficial owner of the property and there was no notice of any adverse claim to the property, whether it was incumbent on the bank to investigate if there was any illegality attached to the underlying SPA, failing which the bank could not qualify as *bona fide* purchaser under the proviso to s. 340(3) of the National Land Code ('NLC') ('question 1'); (ii) in order to qualify as a subsequent purchaser in good faith under the proviso to s. 340(3) of the NLC, whether the bank must clearly show that it was impossible for the bank to have known of the unlawfulness of the sale and purchase transaction even after proper examination and verification of the SPA documents between the vendor and the chargor ('question 2'); (iii) in order to qualify as a subsequent purchaser in good faith under the proviso to s. 340(3) of the NLC, whether the bank must critically look into the documentation, transactional documents (payments and receipts) leading up to the sale and purchase of the properties even though the sale and purchase transaction had been completed and title transferred and registered in the name of the chargor free from encumbrances prior to the creation of the charge with the consent of the vendor ('question 3'); (iv) as a matter of law, given the conflicting decisions in *Bayangan Sepadu Sdn Bhd v. Jabatan Pengairan Dan Saliran Negeri Selangor & Ors* ('*Bayangan Sepadu*'), which in effect answered Questions 1, 2 and 3 above in the negative, as opposed to

A the case of *Au Meng Nam & Anor v. Ung Yak Chew & Ors* ('*Au Meng Nam*'), which in effect answered Questions 1, 2 and 3 above in the affirmative, which of these conflicting decisions was correct in measuring the extent of good faith and/or *bona fide* required of a purchaser within the meaning of the proviso to s. 340(3) of the NLC ('question 4'); and (v) whether the burden
B of proving valuable consideration of a subsequent purchaser under the proviso to s. 340(3) of the NLC extended to proving that valuable consideration had passed between the immediate purchaser and the vendor ('question 5').

Held (allowing appeal; setting aside decisions of High Court and Court of
C **Appeal)**

Per Zabariah Mohd Yusof FCJ delivering the judgment of the court:

(1) The focus of the issue in this appeal was, to what extent of good faith and/or *bona fide* required of a subsequent purchaser within the meaning of proviso to s. 340(3) of the NLC, which was the focus in answering
D question 4. The rest of the questions were answered after question 4. Question 4 required the court to determine which of the the conflicting decisions prevailed in the case of *Bayangan Sepadu* and *Au Meng Nam* as to measuring the extent of good faith and/or *bona fide* required of a purchaser within the meaning of s. 340(3) of the NLC. What could be
E discerned from *Bayangan Sepadu* was that every dealing or transaction of land by a party whose interest was unregistered in the register of documents could not defeat the title of the registered proprietor. In this appeal, the Court of Appeal apparently relied on the sentiment expressed in *Au Meng Nam*. The Court of Appeal failed to appreciate the
F facts in *Au Meng Nam* and the context in which the decision was made. *Au Meng Nam* concerned with an immediate purchaser, unlike this appeal where the third defendant was the subsequent purchaser. Hence, s. 340(3) of the NLC had no application in *Au Meng Nam* as that section referred to a subsequent purchaser and not an immediate purchaser. *Au*
G *Meng Nam* should be taken in its proper context, namely that it was decided based on its own set of facts. *Au Meng Nam* ought not to be taken as authority for the blanket proposition that carelessness or negligence negated good faith under the proviso to s. 340(3) of the NLC. This court should uphold the conclusive nature of the register document of titles
H and, as far as the present appeal was concerned, because of the conclusive nature of the register of titles (whereby the second defendant was the registered proprietor), there was no legal duty on the chargee, the third defendant, to carry out inspection of the property prior to accepting the charge. The chargee was entitled to rely on the register. Even if the chargee did not carry further enquiries prior to the creation
I of the charge, at most that could be said of the third defendant was that, they had been negligent in not carrying out further enquiries but negligence *per se* did not and could not amount to fraud, as the register

of title disclosed that the second defendant was the registered owner and there was no encumbrance on the land and there was no fraud in the present appeal. Under the Torrens system, the register is everything. By accepting and imposing a blanket proposition that carelessness or negligence negated good faith under the proviso to s. 340(3) of the NLC, would tantamount to undermining the very intent and purpose of the Torrens system, namely to give certainty to the register as reflecting the correct particulars on legally recognised land dealings in land matters. The approach taken by the Court of Appeal in this appeal meant that a potential purchaser of land would have to trace all previous transactions of the land and to ensure that all the factors affecting these previous transactions were valid and could not be impugned, despite registered title had been issued. A subsequent purchaser must conduct inquiries and checks on the validity of every single transaction since the registered title was issued to determine the proper provenance of the land. The Court of Appeal had erred when it held that although the third defendant had no notice of or knowledge of any impropriety of the plaintiffs' unregistered interest in the lands, the third defendant should go beyond the register document of title and the sale and purchase transaction to which the third defendant was not a party, to ascertain the propriety of the SPA between the first and second defendants. Given the aforesaid, the case of *Bayangan Sepadu* was the correct decision in measuring the extent of good faith and/or *bona fide* required on a purchaser within the meaning of the proviso to s. 340(3) of the NLC. (paras 41, 42, 46, 56, 62, 64, 84, 86 & 87)

(2) It was undisputed that: (i) contractually, it had been represented that the second defendant was the legal and beneficial owner of the lots; (ii) the second defendant was the registered owner of the land in the register; and (iii) there was no notice of any adverse claim to the lots nor caveat on the same before the creation of the charge in favour of the third defendant. By s. 322(2) of the NLC, the effect of the entry of caveats binds the land itself to prevent any registered disposition of the land except with the caveator's consent until the caveat is removed. In the present appeal, there was no such caveat on the lots as the first plaintiff's private caveat on the land was withdrawn about four years before the lots were sold and transferred to the second defendant. Neither should a duty be imposed on the third defendant to investigate as to why the private caveat had been withdrawn, particularly if withdrawn years ago. At all material times, there was not an iota of evidence to suggest that the third defendant possessed or could have reasonably acquired notice of any irregularities in the sale and purchase transaction between the first and second defendants, to which the third defendant was never a party nor privy to. Whether the lands were empty lands or otherwise, was inconsequential, as it did not change the ownership of the land title.

Hence, it was not incumbent for the third defendant to investigate nor enquire if there was any illegality attached to the underlying SPA between the first and second defendants, after carrying out various due diligence steps before releasing the term loan to the second defendant and the creation of the charge in favour of the third defendant. Question 1 was answered in the negative. (paras 88-92)

(3) It was against the intent and purport of the Torrens system and impractical, to require the third defendant to clearly show that it was 'impossible' for the third defendant to have known of the unlawfulness of the sale and purchase transaction even after proper examination and verification of the SPA documents between the vendor and the chargor. This requirement would create an unnecessary burden on the part of the third defendant and would affect the banking industry as a whole. The requirement, as imposed by the Court of Appeal, was unreasonably high and difficult to attain. Such a requirement also rendered the registration of title meaningless, as a financing institution was expected to doubt/second guess the validity of a registered title and to conduct investigations into concluded transactions which the financing institution was not privy to. Question 2 was answered in the negative. (paras 94-96)

(4) The second defendant and its solicitors had represented to the third defendant's solicitors that the purchase price had been fully paid. The sale and purchase transaction of the lots between the first and second defendants had been completed and the title was transferred and registered without encumbrance, way before the term loan was disbursed by the third defendant. Given the aforesaid, the third defendant, the bank, should not be obligated to further scrutinise the transactional documents to qualify as a subsequent purchaser in good faith under s. 340(3) of the NLC. Question 3 was answered in the negative. (paras 102 & 103)

(5) The proviso to s. 340(3) of the NLC protects the title of a subsequent purchaser in good faith and for valuable consideration. This meant that for the indefeasibility of title to be maintained, there must be valuable consideration between the second defendant and the subsequent purchaser (the third defendant, the bank). However, the Court of Appeal ruled that the third defendant must also demonstrate that valuable consideration passed from the second defendant to the vendor (the first defendant), thereby imposing a burden beyond what s. 340(3) of the NLC required. It was unwarranted to restrict the scope of s. 340(3) in such a manner. The third defendant should not be required to prove the passage of valuable consideration between the immediate purchaser and the vendor, beyond the confirmation received from the second defendant's solicitors. The requirement to seek additional

documentation, such as proper accounts and receipts of payment, was also unnecessary and placed an undue burden on *bona fide* subsequent purchaser, given that the second defendant was registered as the proprietor on the register of title. As the charge was acquired by the third defendant as a purchaser in good faith and for valuable consideration, the third defendant should be accorded the protection of the proviso to s. 340(3) of the NLC. Question 5 was answered in the negative. (paras 104-108)

Bahasa Melayu *Headnotes*

Ini adalah rayuan perayu bank ('defendan ketiga') terhadap keputusan Mahkamah Rayuan yang menolak rayuan defendan ketiga terhadap perintah Mahkamah Tinggi atas alasan bahawa gadaian lot-lot tanah yang berkaitan, yang dibuat memihak pada pihak defendan ketiga, adalah tidak sah dan terbatal. Pertikaian antara pihak-pihak melibatkan empat lot tanah, iaitu Lot 430, 60, 97 dan 716 ('empat lot'). Rayuan ini hanya melibatkan dua daripada empat lot itu, iaitu Lot 97 dan 716 ('dua lot'). Responden-responden adalah pentadbir/wasi hartanah bagi harta pusaka si mati, iaitu Ahmad bin Buang ('si mati'). Defendan pertama dan kedua (seperti di Mahkamah Tinggi) pula adalah pemaju hartanah. Menurut plaintif-plaintif, mereka adalah pemilik benefisial empat lot itu setelah mewarisinya daripada si mati. Walaupun si mati telah membuat bayaran penuh untuk empat lot itu, lot-lot itu tidak pernah didaftarkan atas nama si mati dan kekal berdaftar atas nama defendan pertama. Melalui satu perjanjian jual beli ('PJB'), dua daripada empat lot itu dijual dan dipindah milik pada defendan kedua oleh defendan pertama. Defendan kedua kemudian dinamakan sebagai pemilik kedua-dua lot itu dalam daftar hak milik. Selepas pendaftaran, kedua-dua lot itu digadaikan oleh defendan kedua pada defendan ketiga sebagai cagaran untuk pinjaman bank yang diluluskan oleh defendan ketiga. Plaintif-plaintif mendakwa bahawa pemindahan hak milik dua lot itu, termasuk gadaian yang dimasukkan oleh defendan kedua bagi pihak defendan ketiga, adalah tidak sah dan terbatal. Di Mahkamah Tinggi, (i) plaintif-plaintif memohon relief untuk milikan empat lot tersebut; (ii) defendan pertama memfailkan tuntutan balas untuk milikan kosong empat lot dan ganti rugi atas pembatalan PJB-PJB; dan (iii) defendan kedua memohon ganti rugi berdasarkan nilai atau harga jualan empat lot, termasuk yuran guaman bagi memindah hak milik empat lot. Mahkamah Tinggi memutuskan plaintif-plaintif berjaya membuktikan tuntutan mereka terhadap defendan-defendan. Namun, tuntutan balas defendan pertama dan kedua ditolak. Terkilan, defendan kedua dan ketiga, masing-masing, memfailkan rayuan mereka di Mahkamah Rayuan. Di Mahkamah Rayuan, rayuan-rayuan mereka ditolak manakala keputusan Mahkamah Tinggi disahkan. Maka timbul rayuan ini. Soalan undang-undang yang ditimbulkan dalam rayuan ini adalah: (i) dalam keadaan apabila terdapat representasi kontrak bahawa pemberi gadaian adalah pemilik sah dan benefisial sebidang hartanah, dan ketiadaan notis kewujudan

tuntutan yang menjejaskan terhadap hartanah itu, sama ada pihak bank berkewajipan untuk memastikan PJB yang dimasuki tidak mempunyai apa-apa ketaksahan kerana, jika gagal, pihak bank tidak akan layak atau berhak dijadikan pembeli *bona fide* menurut proviso s. 340(3) Kanun Tanah Negara ('KTN') ('soalan 1'); (ii) untuk melayakkan diri sebagai pembeli terkemudian dengan niat baik menurut proviso s. 340(3) KTN, sama ada pihak bank perlu menunjukkan secara jelas bahawa mustahil untuk pihak bank mengetahui tentang ketaksahan yang terdapat pada PJB yang dimasuki antara penjual dan pemberi gadaian selepas pemeriksaan dan pengesahan dijalankan atas PJB itu ('soalan 2'); (iii) untuk melayakkan diri sebagai pembeli terkemudian dengan niat baik menurut s. 340(3) KTN, sama ada pihak bank harus melihat secara kritikal pada dokumentasi dan dokumen-dokumen transaksi (pembayaran dan resit) yang digunakan untuk melengkapkan pembelian dan penjualan mana-mana hartanah walaupun transaksi jual beli tersebut telah disempurnakan dan hak milik hartanah itu telah dipindah milik dan didaftarkan atas nama pemberi gadaian tanpa apa-apa halangan sebelum gadaian dibuat atas kebenaran penjual ('soalan 3'); (iv) susulan penghakiman bercanggah dalam kes *Bayangan Sepadu Sdn Bhd v. Jabatan Pengairan Dan Saliran Negeri Selangor & Ors* ('*Bayangan Sepadu*'), yang mengakibatkan soalan 1 hingga 3 perlu dijawab secara negatif, dan dalam kes *Au Meng Nam & Anor v. Ung Yak Chew & Ors* ('*Au Meng Nam*'), yang menyebabkan soalan 1 hingga 3 perlu dijawab secara afirmatif, mana antara penghakiman bercanggah tersebut yang boleh diikuti dalam menentukan takat niat baik dan/atau *bona fide* yang diperlukan oleh pembeli dalam menuruti kehendak proviso s. 340(3) KTN ('soalan 4'); dan (v) sama ada beban pembeli terkemudian untuk membuktikan balasan bernilai, menurut proviso s. 340(3) KTN, termasuk beban untuk membuktikan penyerahan balasan bernilai antara penjual dan pembeli semasa telah berlaku ('soalan 5').

Diputuskan (membenarkan rayuan; mengetepikan keputusan Mahkamah Tinggi dan Mahkamah Rayuan)

Oleh Zabariah Mohd Yusof HMP menyampaikan penghakiman mahkamah:

(1) Isu yang difokuskan dalam rayuan ini, yang juga fokus dalam menjawab soalan 4, adalah, apakah takat niat baik dan/atau *bona fide* yang diperlukan oleh pembeli terkemudian bagi menuruti maksud proviso s. 340(3) KTN. Soalan-soalan lain akan dijawab selepas soalan 4 dijawab. Soalan 4 mengkehendaki agar mahkamah menentukan mana antara penghakiman bercanggah dalam kes *Bayangan Sepadu* dan *Au Meng Nam* yang boleh diikuti dalam menentukan takat niat baik dan/atau *bona fide* yang diperlukan oleh pembeli terkemudian bagi menuruti maksud proviso s. 340(3) KTN. Berdasarkan *Bayangan Sepadu*, setiap urus niaga dan transaksi tanah yang dilakukan oleh pihak yang mana kepentingannya adalah tidak berdaftar dalam daftar hak milik, tidak boleh menyangkal hak milik pemilik yang berdaftar. Dalam

rayuan ini, Mahkamah Rayuan telah bergantung pada sentimen yang dinyatakan dalam *Au Meng Nam*. Mahkamah Rayuan gagal menghayati fakta dalam *Au Meng Nam* dan konteks mengapa keputusan dalam kes itu dibuat. *Au Meng Nam* menyentuh tentang pembeli semasa, berbeza dengan rayuan ini kerana defendan ketiga adalah pembeli terkemudian. Seksyen 340(3) KTN tidak boleh diguna pakai dalam *Au Meng Nam* kerana seksyen itu merujuk pada pembeli terkemudian dan bukan pembeli semasa. *Au Meng Nam* seharusnya diguna pakai menurut konteksnya yang betul, iaitu kes itu diputuskan berdasarkan set faktanya sendiri. *Au Meng Nam* tidak boleh dijadikan autoriti untuk mencadangkan secara menyeluruh bahawa kelalaian atau kecuaian akan menghapuskan niat baik bawah proviso s. 340(3) KTN. Mahkamah ini patut menjunjung sifat kemuktamadan daftar hak milik dan demi kepentingan rayuan ini, kerana sifat kemuktamadan daftar hak milik (apabila defendan kedua adalah pemilik berdaftar), tiada kewajipan undang-undang bagi penerima gadaian, yakni defendan ketiga, untuk menjalankan pemeriksaan pada hartanah sebelum gadaian diterima. Penerima gadaian berhak bergantung pada daftar hak milik. Sekalipun penerima gadaian tidak menjalankan apa-apa siasatan lanjutan sebelum gadaian dibuat, defendan ketiga hanya boleh dikatakan cuai kerana tidak menjalankan siasatan lanjutan. Kecuaian secara sendirinya tidak tergolong pada penipuan, terutama apabila daftar hak milik mendedahkan bahawa defendan kedua adalah pemilik berdaftar tanah dan tanah itu tidak memiliki apa-apa halangan dan tiada penipuan dalam rayuan ini. Mengikut sistem Torrens, daftar hak milik adalah segalanya. Melalui penerimaan dan penyangkutan cadangan menyeluruh bahawa kelalaian atau kecuaian menghapuskan niat baik bawah proviso s. 340(3) KTN, itu telah membelakangkan matlamat dan tujuan sebenar sistem Torrens, iaitu untuk memberi kepastian kepada daftar hak milik sebagai cerminan butir-butir yang betul tentang urus niaga tanah yang diiktiraf secara sah dalam hal perkara tanah. Pendekatan yang diketengahkan oleh Mahkamah Rayuan dalam rayuan ini membawa maksud bakal pembeli tanah harus mengkaji semua transaksi terdahulu berkaitan tanah itu dan harus memastikan semua faktor yang memberi kesan pada transaksi terdahulu itu adalah sah dan tidak boleh dipertikaikan, walaupun hak milik berdaftar telah diisukan. Pembeli juga dikehendaki melakukan siasatan dan semakan pada kesahihan setiap satu transaksi memandangkan hak milik berdaftar diisukan untuk menentukan asal usul tanah yang betul. Mahkamah Rayuan terkhilaf apabila menyimpulkan bahawa walaupun defendan ketiga tidak mempunyai apa-apa notis atau pengetahuan tentang apa-apa ketidakwajaran tentang kepentingan tidak berdaftar plaintif-plaintif atas tanah-tanah, defendan ketiga harus melampaui dokumen daftar hak milik dan transaksi jual beli

yang defendan bukanlah pihak, untuk memutuskan kewajaran PJB yang dimasuki antara defendan pertama dan kedua. Berdasarkan alasan tersebut, kes *Bayangan Sepadu* adalah keputusan yang boleh diikuti dalam menentukan takat niat baik dan/atau *bona fide* yang diperlukan oleh pembeli bagi menuruti maksud proviso s. 340(3) KTN.

(2) Tidak dipertikaikan bahawa: (i) melalui kontrak, defendan kedua dinyatakan sebagai pemilik sah dan benefisial empat lot; (ii) defendan kedua adalah pemilik tanah yang didaftarkan pada daftar hak milik; (iii) tiada notis dikemukakan tentang apa-apa tuntutan bertentangan atau kaveat telah dimasukkan pada empat lot sebelum gadaian yang memihak pada defendan ketiga dibuat. Melalui s. 322(2) KTN, apabila kaveat dimasuki, itu akan mengikat tanah itu sendiri bagi menghalang mana-mana pelupusan berdaftar terhadap tanah itu kecuali diberi kebenaran oleh pengkaveat atau sehingga kaveat itu dikeluarkan. Dalam rayuan ini, tiada kaveat dimasukkan pada empat lot, malah, kaveat persendirian yang pernah dimasukkan oleh plaintif pertama telah ditarik balik empat tahun sebelum empat lot itu dijual dan dipindah milik pada defendan kedua. Tiada kewajipan juga harus dikenakan pada defendan ketiga untuk melaksanakan siasatan terhadap alasan mengapa penarikan balik kaveat itu berlaku, terutama penarikan balik itu telah dilakukan bertahun lamanya. Pada setiap masa material, tiada apa-apa keterangan dikemukakan untuk mengatakan defendan ketiga memiliki atau mungkin telah menerima notis tentang apa-apa ketakaturan dalam transaksi jual beli antara defendan pertama dan kedua, yang mana defendan ketiga bukan pihak atau mempunyai pengetahuan. Sama ada tanah-tanah adalah tanah-tanah kosong atau sebaliknya, adalah tidak penting, kerana itu tidak mengubah milikan hak milik tanah. Berikutan itu, defendan ketiga tidak berkewajipan menyiasat atau menyelidik jika terdapat apa-apa ketakaturan pada PJB yang dimasuki antara defendan pertama dan kedua, selepas menjalankan pelbagai langkah penilaian wajar sebelum pinjaman berjangka dilepaskan kepada defendan kedua dan gadaian yang memihak defendan ketiga dibuat. Soalan 1 dijawab secara negatif.

(3) Selain bertentangan dengan matlamat dan tujuan sistem Torrens, tidak praktikal untuk mengkehendaki agar defendan ketiga menunjukkan bahawa adalah 'mustahil' bagi defendan ketiga untuk mengetahui tentang ketaksahan transaksi jual beli walaupun selepas pemeriksaan dan pengesahan dilaksanakan pada dokumen-dokumen PJB yang dimeterai antara penjual dan pemberi gadaian. Keperluan ini hanya akan mendatangkan beban yang tidak perlu pada defendan ketiga dan akan memberikan implikasi pada keseluruhan industri perbankan. Keperluan yang dikenakan oleh Mahkamah Rayuan terlalu tinggi dan sukar untuk dipenuhi. Keperluan tersebut akan mengakibatkan pendaftaran hak milik tidak bermakna, kerana institusi kewangan dikehendaki untuk

meragui/meneka kesahihan hak milik berdaftar atau memulakan siasatan terhadap transaksi-transaksi yang telah diselesaikan yang mana tidak mempunyai kaitan dengan institusi kewangan itu. Sehubungan itu, soalan 2 dijawab secara negatif.

(4) Defendan kedua dan peguamnya telah memaklumkan peguam defendan ketiga bahawa harga jualan sudah dibayar sepenuhnya. Transaksi jual beli untuk empat lot antara defendan pertama dan kedua telah diselesaikan, dan hak milik empat lot itu telah dipindah milik dan didaftarkan tanpa apa-apa halangan, lama sebelum pinjaman berjangka dilepaskan oleh defendan ketiga. Susulan itu, defendan ketiga, iaitu pihak bank, tidak seharusnya dipertanggungjawabkan untuk meneliti dengan lebih mendalam dokumen-dokumen transaksi demi melayakkan diri sebagai pembeli terkemudian dengan niat baik menurut s. 340(3) KTN. Soalan 3 dijawab secara negatif.

(5) Proviso s. 340(3) KTN melindungi hak milik yang dimiliki pembeli terkemudian dengan niat baik dan balasan bernilai. Ini bermaksud, untuk ketaksangkalan hak milik dikekalkan, mesti terdapat balasan bernilai antara defendan kedua dan pembeli terkemudian (defendan ketiga, iaitu pihak bank). Walau bagaimanapun, Mahkamah Rayuan memerintahkan defendan ketiga untuk menunjukkan bahawa balasan bernilai telah berpindah daripada defendan kedua kepada penjual (defendan pertama), lantas meletakkan beban pada defendan ketiga yang melampaui keperluan s. 340(3) KTN. Skop s. 340(3) KTN tidak sepatutnya dihadkan sebegitu rupa. Defendan ketiga tidak seharusnya disyaratkan untuk membuktikan perjalanan balasan bernilai antara pembeli semasa dan penjual, yang melampaui pengesahan yang diterima daripada peguam defendan kedua. Syarat untuk mendapatkan dokumen tambahan, seperti akaun-akaun yang betul dan resit-resit pembayaran, juga tidak perlu dan itu meletakkan beban tidak seimbang pada pembeli terkemudian dengan niat baik, kerana defendan kedua telah pun didaftar sebagai pemilik pada daftar hak milik. Berikutan gadaian didapatkan oleh defendan ketiga sebagai seorang pembeli terkemudian dengan niat baik dan balasan bernilai, defendan ketiga hendaklah diberikan perlindungan menurut proviso s. 340(3) KTN. Soalan 5 dijawab secara negatif.

Case(s) referred to:

Adorna Properties Sdn Bhd v. Boonsom Boonyanit [2001] 2 CLJ 133 FC ***(refd)***

Assets Company v. Mere Roihi [1905] AC 176 ***(refd)***

Au Meng Nam & Anor v. Ung Yak Chew & Ors [2007] 4 CLJ 526 CA ***(refd)***

Bayangan Sepadu Sdn Bhd v. Jabatan Pengairan Dan Saliran Negeri Selangor & Ors [2022] 2 CLJ 1 FC ***(refd)***

CIMB Bank Bhd v. AmBank (M) Bhd & Ors [2017] 9 CLJ 145 FC ***(refd)***

Datuk Jaginder Singh & Ors v. Tara Rajaratnam [1983] CLJU 21; [1983] 1 LNS 21 FC ***(refd)***

Doshi v. Yeoh Tiong Lay [1974] CLJU 30; [1974] 1 LNS 30 FC ***(refd)***

Eng Mee Yong & Ors v. V Letchumanan [1979] CLJU 18; [1979] 1 LNS 18 ***(refd)***
Holee Holdings (M) Sdn Bhd v. Chai Him & Ors [1997] CLJU 424; [1997] 1 LNS 424 HC ***(refd)***
Lian Keow Sdn Bhd (In Liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors [1988] CLJU 44; [1988] 1 LNS 44 SC ***(refd)***
Liputan Simfoni Sdn Bhd v. Pembangunan Orkid Desa Sdn Bhd [2019] 1 CLJ 183 FC ***(refd)***
Ong Ban Chai & Ors v. Seah Siang Mong [1998] 3 CLJ 637 CA ***(refd)***
Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors [1998] 1 CLJ 793 FC ***(refd)***
Pushpaleela R Selvarajah & Anor v. Rajamani Meyappa Chettiar & Other Appeals [2019] 3 CLJ 441 FC ***(refd)***
Score Option Sdn Bhd v. Mexaland Development Sdn Bhd [2012] 7 CLJ 802 FC ***(refd)***
See Leong Chye & Anor v. United Overseas Bank (Malaysia) Bhd [2021] 6 CLJ 650 FC ***(refd)***
T Damodaran v. Choe Kuan Him [1979] CLJU 107; [1979] 1 LNS 107 PC ***(refd)***
T Sivam Tharamalingam v. Public Bank Bhd [2018] 6 CLJ 1 FC ***(refd)***
Tai Lee Finance Co Sdn Bhd v. Official Assignee & Ors [1983] 1 CLJ 183; [1983] CLJ (Rep) 387 ***(refd)***
Tai Lee Finance Co Sdn Bhd v. The Official Assignee Of The Property Of Ngan Kim Yong & Ors [1983] 1 CLJ 183; [1983] CLJ (Rep) 387 FC ***(refd)***
Tan Ying Hong v. Tan Sian San & Ors [2010] 2 CLJ 269 FC ***(refd)***
Teh Bee v. K Maruthamuthu [1977] CLJU 134; [1977] 1 LNS 134 FC ***(refd)***
Than Kok Leong v. Low Kim Hai [1983] 1 CLJ 95; [1983] CLJ (Rep) 907 HC ***(refd)***
Zainal Abidin Mohamed v. Roslan Abdul Aziz & Anor [2003] 7 CLJ 132 HC ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 6
National Land Code, ss. 89, 322(2), 340(1), (2)(a), (b), (3), (4)(b)

Other source(s) referred to:
Datuk Professor Ahmad Ibrahim & Judith Sithombing, *The Centenary of the Torrens System in Malaysia*, MLJ, 1989, p 2
Teo Keang Sood & Khaw Lake Tee, *Land Law in Malaysia, Cases and Commentary,* 3rd edn, pp 182-183
Teo KS & Khaw LT, *Land Law in Malaysia,* 1965, 2nd edn, Butterworths, p 7

For the appellant - Khoo Guan Huat, Claudia Cheah Pek Yee, Aufa Radzi & Anson Liow; M/s Skrine
For the respondents - Shakir Hussain; M/s Shakir Hussain

[Editor's note: For the Court of Appeal judgment, please see Malayan Banking Bhd v. Mohd Affandi Ahmad & Anor And Another Appeal [2023] 10 CLJ 406 (overruled); For the High Court judgment, please see Mohd Affandi Ahmad & Anor v. Pembangunan Tanah Dan Perumahan Sdn Bhd & Ors [2022] CLJU 1217; [2022] 1 LNS 1217 (overruled).]

Reported by Lina E

JUDGMENT

Zabariah Mohd Yusof FCJ:

[1] The appellant, Malayan Banking Berhad appealed against the decision of the Court of Appeal. The Court of Appeal had dismissed Malayan Banking Berhad's appeal against the High Court's order dated 28 February 2022 which held that the charge created in favour of Malayan Banking Berhad over the subject lands is null and void.

[2] This court had granted leave to Malayan Banking Berhad to appeal on the following questions of law:

> 1. Where there is contractual representation that the chargor is the legal and beneficial owner of the property and there is no notice of any adverse claim to the property, whether it is incumbent on the bank to investigate if there is any illegality attached to the underlying sale and purchase agreement, failing which the bank cannot qualify as a *bona fide* purchaser under the proviso to section 340(3) of the National Land Code, 1965?
>
> 2. In order to qualify as a subsequent purchaser in good faith under the proviso to section 340(3) of the National Land Code 1965, whether the bank must clearly show that it was impossible for the bank to have known of the unlawfulness of the sale and purchase transaction even after proper examination and verification of the sale and purchase agreement documents between the vendor and the chargor?
>
> 3. In order to qualify as a subsequent purchaser in good faith under the proviso to section 340(3) of the National Land Code 1965, whether the bank must critically look into the documentation, transactional documents (payments and receipts) leading up to the sale and purchase of the properties even though the sale and purchase transaction has been completed and title transferred and registered in the name of the chargor free from encumbrances prior to the creation of the charge with the consent of the vendor?
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> 4. As a matter of law, given the conflicting decisions in the following cases of:
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> - *Bayangan Sepadu Sdn Bhd v. Jabatan Pengairan dan Saliran Negeri Selangor & Ors* [2022] 2 CLJ 1; [2022] 1 MLJ 701 – which in effect answered the 1st, 2nd and 3rd Questions above in the **negative** as opposed to the case of
>
> - *Au Meng Nam & Anor v. Ung Yak Chew & Ors* [2007] 4 CLJ 526; [2007] 5 MLJ 136 – which in effect answered the 1st, 2nd and 3rd Questions above in the **affirmative** which of these conflicting decisions is correct in measuring the extent of good faith and/or *bona fide* required of a purchaser within the meaning of the proviso to Section 340(3) of the National Land Code 1965?
>
> 5. Whether the burden of proving valuable consideration of a subsequent purchaser under the proviso to Section 340(3) of the National Land Code 1965 extends to proving that valuable consideration has passed between the immediate purchaser and the vendor? (emphasis added)

[3] The appeal before us only concerns Malayan Banking Berhad.

[4] We heard the appeal on 3 July 2024. After having perused the records of appeal, the relevant cause papers, and hearing oral submissions, and reading written submissions from both parties, we unanimously allowed the appeal by Malayan Banking Berhad and set aside the orders of the lower courts on the same day. We now provide our reasons for so deciding.

[5] In this judgment we will refer to parties, as they were, in the High Court. The first, second and third defendants will be referred to as D1, D2, and D3 respectively. Malayan Banking Berhad is D3 in this judgment.

Background

[6] The plaintiffs are the administrators/executors of the estate of the one Ahmad bin Buang (hereinafter referred to as "the deceased"), pursuant to letters of administration dated 4 May 2011.

[7] D1 and D2 are property developers, while D3 is a bank.

[8] The dispute between the parties is four lots of lands, *ie*, Lot 430, Lot 60, Lot 97, and Lot 716. As far as the present appeal is concerned, only Lot 97 and Lot 716 form the subject matter of the dispute before us. We will refer to Lot 97 and Lot 716 as "the two lots" in this judgment.

[9] D1 was wound up on 13 July 2020. After leave was granted, Jabatan Insolvensi on behalf of D1, informed the court that it would not be defending the plaintiff's claim. Therefore, the plaintiffs' evidence against D1 stood unchallenged as far as the lots of land are concerned.

[10] The plaintiffs' claim that they are the beneficial owners of all the four lots, having inherited them from the deceased who claimed to have paid D1 the full purchase price. The deceased had entered into four SPAs with one Syed Ali (who signed under power of attorney for and on behalf of four individuals and D1). Despite payment having been made in full by the deceased to D1, the four lots (which included the two lots) were never registered in the deceased's name but remained registered under D1's name.

[11] The two lots were subsequently sold and transferred by D1 to D2 on 2 June 2019 *vide* a sales and purchase agreement (SPA) dated 8 August 2018 whereby D1 sold 108 plots of land to D2 (which included the two lots) (this agreement was referred to as the "second SPA" in the Court of Appeal grounds.)

[12] D2 subsequently was registered as the owner of the two lots in the register of titles and subsequently charged them to D3, as security for banking facilities granted by D3 to D2.

[13] The banking facilities granted by D3 to D2 were in the form of a term loan which is a reimbursement facility. Under the reimbursement facility, D3 disbursed the loan sum to D2 (the purchaser) and not to D1 (the vendor).

At the time when D3 was asked to grant the financial facilities in respect of the lands, the second SPA between D1 and D2 was already completed and the title was already transferred to D2. There was no reason for D3 to disburse the loan to D1.

[14] It is also to be noted that, at this point in time there was no encumbrance on the two lots. An earlier caveat on the two lots was withdrawn four years before it was sold to D2. D3 was never involved, nor privy to the second SPA between D1 and D2.

[15] Despite the two lots being sold to D2 by D1, the plaintiffs argued that D1 held them in trust for them. The plaintiffs claimed that the transfers of the two lots to D2 were null and void, along with charges registered by D2 in favour of D3.

[16] The plaintiffs sought relief as to ownership of the four lots of land, *ie*, Lot 430, Lot 607, and the two lots.

[17] D1 counterclaimed for vacant possession of the lots and damages for nullifying the sale and purchase agreements (SPAs), while D2 sought damages in the amount of the value or selling price of the lots, including legal costs and costs involved in the transfer of those lots.

Proceedings In The High Court

[18] After a full trial, the High Court concluded that the plaintiffs had successfully proven their claim against D1 regarding all the lots, extending their claim to the two lots against D2 and D3. It held that:

(i) plaintiffs made it clear that they were not pursuing the issue of fraud against D1 and that was not the premise of the plaintiffs' claim against D1;

(ii) the deceased had paid the full purchase price to D1 and was given possession of the two lots. D1 was a bare trustee who held the two lots for and on behalf of the first plaintiff since the first plaintiff had inherited it from the deceased. Pursuant to s. 340(4)(b) of the NLC, D1 was contractually and conscientiously obliged to have registered the two lots in the name of the deceased/plaintiffs;

(iii) D1 has not produced any witness. Therefore, there was unrebutted evidence as to the two lots that:

(a) the deceased had purchased the lots from D1;

(b) the deceased had paid the full purchase price to D1 for the two lots;

(c) the deceased had taken possession of the lots and built permanent structures; and

(d) the plaintiffs as co-administrators of the estate of the deceased are the rightful owners of the two lots.

(iv) D1 did not have any rights or interest over the two lots and as such, had no rights to transfer the lands to D2;

(v) as D2, it is a subsequent purchaser, therefore s. 340(3) applies. The High Court relied on the case of *Au Meng Nam* and held that D2 could not avail itself of the proviso to s. 340(3) NLC as it failed to demonstrate being a *bona fide* purchaser for valuable consideration. The transaction between D1 and D2 was dubious and suspicious and after evaluating the evidence, led to the irresistible inference that the sale and purchase of the two lots by D2 was not done in good faith, and neither was there valuable consideration leading to the conclusion that title of D2 to the two lots must be set aside; and

(vi) D2's title was thus invalidated, leading to the defeat of charges registered in favour of D3, who also could not prove their *bona fide* purchaser status. The charge created over the two lots was null and void.

[19] Despite granting the plaintiffs' claim in principle, the learned High Court Judge dismissed their request for general damages.

[20] Additionally, due to a lack of evidence, the counterclaim by both D1 and D2 against the plaintiffs were dismissed. The plaintiffs were awarded costs from both D2 and D3. D3 was to pay costs to the plaintiffs in the sum of RM15,000 subject to allocator.

Proceedings In The Court Of Appeal

[21] Aggrieved by the decision of the High Court, both D2 and D3 appealed to the Court of Appeal (COA).

[22] Both appeals were heard, and the Court of Appeal dismissed both appeals and affirmed the decision of the High Court.

[23] In the COA, the issues that arose were whether the High Court was correct in deciding that whether:

(i) two SPAs entered into between the deceased and one Syed Ali, as attorney pursuant to power of attorney dated 26 July 1967 for and on behalf of four individuals and D1, were validly binding on D1;

(ii) D2 was a subsequent purchaser;

(iii) D3 being a subsequent purchaser, *ie*, chargee, derived its rights from D2 as the immediate purchaser; and

(iv) D3 was not a *bona fide* purchaser for value.

[24] The COA premised its decision on the following reasons:

(i) D1 had waived its opportunity to participate in the trial and defend against the plaintiffs' claim under the two SPAs. Judgment must be given in favour of the plaintiffs as D1, being the only other party privy to the SPAs aside from the deceased *via* the plaintiff, had not even

bothered to cross-examine the evidence regarding the validity of the SPAs at trial. Estoppel shall apply to bar D1 and D2 from inequitably denying the validity of the two SPAs. In view of the validity of the two SPAs and the full payment of the purchase prices to D1 by the deceased, D1, as a vendor, now continuously held the two properties under constructive trust for the benefit of the deceased's estate. The first issue was answered in the positive;

(ii) both the deceased and D2 were immediate purchasers who bought the same two properties from D1. Although D2's purchase was subsequent in time, D2 was still not a subsequent purchaser within the context of deferred indefeasibility. The deceased's estate was already clothed with right *in rem* over the two lots when he paid the purchase prices for both properties 50 years ago. Even if D2 had later paid the full purchase price to D1, where there was no proof of such payment being made, D2 would only hold a right *in personam* against D1 under the second SPA. D2's title over the two lots, as immediate purchaser, did not at all enjoy any protection of deferred indefeasibility and should accordingly be vitiated. The second issue was answered in the negative;

(iii) it naturally followed, from the answer on the second issue, that the High Court was in error in deciding that D3, as a chargee, derived its rights from D2 as the subsequent purchaser with deferred indefeasibility. The entirety of the learned judge's discourse on whether D2 was a *bona fide* purchaser for value was unnecessary. D2's title over the property as the immediate purchaser does not enjoy any protection of differed indefeasibility and should accordingly be vitiated. The High Court erred to decide on the position of D2 in the context and upon the basis of deferred indefeasibility, as subsequent purchaser;

(iv) D3's position as a chargee fell within the classification of the subsequent purchaser within the context of deferred indefeasibility. The third issue was answered in the negative; and

(v) D3 contended that on the face of the title and the second SPA's documentation would not, at all, reveal any indication of the deceased's interest *vide* the sale under the prior two SPAs. However, even if D3 would have no notice of the deceased's unregistered interest, it did not automatically allow D3 to assume the legitimacy and validity of the transaction under the second SPA between D1 and D2. It remained incumbent upon D3 to examine the second SPA even if there was no notice at all of the deceased's unregistered interest from the face of the title. It would be gravely unjust to allow D3 to feign innocence in the face of its glaring omissions, failure of inquiry, and insufficient due diligence. Therefore, D3 was indeed not a *bona fide* purchaser for value. D3, accordingly, ought to be disqualified from relying on its deferred indefeasibility under s. 340(3) of the National Land Code (NLC).

A **D3's Complaint In The Present Appeal**

[25] Aggrieved with the decision of the COA, only D3 filed an appeal to the Federal Court with the above-mentioned questions of law.

[26] The complaints by D3 on the decision of the Court of Appeal are as follows:

B

(i) the Court of Appeal has misdirected itself by relying on a mistaken premise that the transaction in this case was one which involved "finance the purchase" by the borrower/chargor. In so doing, the Court of Appeal had decided that D3 had obligations to verify the validity of the sale and purchase transaction;

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(ii) the COA held that D3 must prove that it was impossible for D3 to have known of the unlawfulness of the transaction between D1 and D2, even after proper examination and verification of the documents under the underlying sale and purchase transaction, not just on the face of the register document of title. The impact of the decision of the Court of Appeal has now imposed a commercially unrealistic burden on the financial institutions by requiring a financier to prove that it would have been "impossible" to discover any unlawfulness after carrying out critical examination of concluded transactional documents which the financier is not privy to, in order to qualify the financier as a subsequent purchaser in good faith under the proviso to s. 340(3) of the National Land Code (NLC). The relevant excerpts of the judgment of the COA are reproduced below:

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> [46] In brief, good faith must be proven in that the subsequent purchaser (or chargee in this appeal) must prove that he had exercised all due diligence in *critically examining the legitimacy of the transaction not just on the face of the register document of title, but on the documents involved in the transaction itself.* Thus, pristine "innocence" and "conscience" of the Bank must be proven in that the Bank must critically look into the documentation, transactional documents (payments and receipts) leading up to the sale and purchase of the 2 properties under the 2nd SPA.

G

> [47] Although the general rule of the Torrens System is that every dealing regarding a property is assumed to be reflected within the register document of title, but it would be remiss and *naïve* for us to rigidly apply such assumption while ignoring the glaring realities and dangers of unscrupulous transactions that can be clearly be identified by examination itself. *The Bank must clearly prove that it was impossible for the Bank to have known of the unlawfulness of the transaction even after proper examination and verification of the documents under the 2nd SPA.* (emphasis added)

H

I

The Issue In The Present Appeal

[27] At the heart of the present appeal is the issue of the conclusiveness of the land register, which is central to the Torrens system, which our NLC is premised upon. The answers given by this court will determine whether financial institutions, which is a subsequent purchaser like D3, are obligated to go behind the land register to investigate the validity or the lawfulness of the underlying documents of completed sale transactions. In the event the answer is in the affirmative, what is the extent of such obligation to be imposed, with specific regard to what is the extent of good faith and *bona fide* required of such a purchaser within the meaning of s. 340(3) of the NLC.

Statutory Provision In The NLC Relevant To The Issue

[28] The relevant statutory provisions which are relevant to the issue at hand are ss. 89 and 340 of the NLC. Given that it is undisputed that D2 is the registered owner of the two lots, the aforesaid sections play a vital role. Section 89 of the NLC provides for the conclusiveness of the register document of title which we reproduced herein for clarity:

> 89. Conclusiveness of register documents of title.
>
> Every register document of title duly registered under this Chapter shall, subject to the provisions of this Act, be conclusive evidence -
>
> (a) that title to the land described therein is vested in the person or body for the time being named therein as proprietor; and
>
> (b) of the conditions, restrictions in interest and other provisions subject to which the land is for the time being held by that person or body, so far as the same are required by any provision of this Act to be specified to referred to in that document.

[29] The proviso to s. 340(3) confers the indefeasibility of title or interest on *bona fide* purchasers for valuable consideration. The section reads as follows:

> S. 340
>
> (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
>
> (2) The title or interest of any such person or body shall not be indefeasible
>
> (a) in any case of fraud ... to which the person or body, or any agent of the person or body, was a party or privy; or
>
> (b) where registration was obtained by forgery, ...; or
>
> (c) ...

A (3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in subsection (2) -

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

B (b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming C through or under such a purchaser.

(4) ... (emphasis added)

[30] Hence, pursuant to s. 340(1), the proprietor whose name has been registered in the register document of title will obtain an indefeasible title to or interest in the land. However, such title or interest so acquired is liable D to be set aside under s. 340(2) where it has been obtained by, *inter alia*, fraud or forgery. In the case of fraud, s. 340(2)(a) provides for the title or interest obtained to be defeasible where the proprietor or his agent is a party or privy to the fraud. In the case of forgery, s. 340(2)(b) provides for the title or interest so acquired by the proprietor or transferee immediately to the E forgery to be defeasible and liable to be set aside. This is so, irrespective of whether the said proprietor or transferee acted in good faith in acquiring the title or interest. This is because there is no similar requirement, as in the case of fraud, that he must also be a party or privy to the forgery. In these circumstances, where the title or interest is subsequently transferred, F s. 340(3)(a) provides that the subsequent proprietor or transferee will similarly obtain a defeasible title or interest. Also, under s. 340(3)(b), any interest subsequently granted out of a title which is defeasible under s. 340(2)(a) and (b) will attract the same consequence. However, where the subsequent proprietor or transferee acts in good faith and gives valuable G consideration for the title or interest in question, s. 340(3) proviso confers protection on such a subsequent proprietor or transferee such that his title or interest will be indefeasible. This is what we call the concept of deferred indefeasibility. Our present appeal is concerned with the proviso of s. 340(3) of the NLC.

H **Analysis And Findings Of This Court**

[31] It is undisputed that on 2 June 2019, the two lots were transferred from D1 to D2, and D2 became the registered owner of the same. As D2 is the proprietor whose name has been registered in the register document of title, D2 obtained an indefeasible title to, or interest in the land pursuant to I s. 340(1). It has been affirmed in the High Court grounds at para. 58 that the plaintiffs had made it clear that they were not pursuing the issue of fraud against D1 and neither was fraud the premise of the plaintiffs' claim. It was also not pleaded by the plaintiffs.

[32] D3 granted financing to D2 for a development project. The loan concerned in this particular case was for working capital requirements in relation to the development project and reimbursement for the purchase of lands for the development project. It was not a case of end-financing, *ie*, to finance and purchase of lands by D2, the borrower/chargor. This is evident from the letter of offer by D3 to D2 at para. 3 of the same. The banking facilities granted by D3 were in the form of a term loan where under such financing arrangement, D3 disbursed the loan sum to D2 (purchaser) and not D1 (the vendor). This is primarily due to the fact that D2 had already paid for the lands in full and is already the registered owner of the same. As such, there is no reason for D3 to disburse the loan to D1. It is also not disputed that D3 would only allow for reimbursement/drawdown on the term loan after D3 was satisfied that D2 is the registered owner of the lands and that the same was free from encumbrance. Therefore, at the time when the finance facility was granted to D2:

(i) D3 was satisfied that D2 had paid fully for the two lots when D2 applied for the term loan;

(ii) the two lots were already transferred and registered in the name of D2;

(iii) the lots were free from encumbrances in the register document of title, before they were offered to D3 as collateral for the financing. Hence, there was no necessity to finance the purchase of the two lots from D1; and

(iv) the sale and purchase transaction between D1 to D2 was already completed without the involvement of D3. D3 was never privy to the sale and purchase agreement between D1 and D2.

[33] The charge was duly registered with the land office on 24 June 2019 and with the Companies Commission of Malaysia on 28 June 2019.

[34] In this respect, the Court of Appeal erred when it failed to appreciate the fact that the transaction in this case, was not one which involved "financing the purchase" of the two lots by the borrower/chargor, D2. The Court of Appeal assumed that it was an "end financing" for the purchase of the lots. Hence, it is our judgment that the Court of Appeal in making its findings that the transaction was an "end financing" of the lots, had erroneously concluded and held that D3 had obligations:

(i) to verify the validity of the sale and purchase transaction between D1 and D2; and

(ii) to show that it would have been "impossible" to discover any unlawfulness after carrying out a critical examination of concluded transactional SPA between D1 and D2, of which D3 was not privy to.

[35] What is pertinent to take note is that, it was never the stand by D1 that D2 failed to pay for the lots or that the transfer of title to D2 was without consideration. In addition, the plaintiffs did not plead that D2 failed to pay D1 for the two lots, and neither was it pleaded that D3 is not a *bona fide* purchaser for valuable consideration. It was only pleaded that D1 was a bare trustee and had no right to sell the two lots to D2. Consequently, D2 had no right to charge the same to D3.

[36] The facts also disclosed that, based on the land searches, there was one private caveat lodged by the first plaintiff, which was subsequently withdrawn on 30 September 2015. The two lots were transferred from D1 to D2, four years later, on 2 June 2019. At the time when D2 became the registered owner of the same, there was indeed no encumbrance on the two lots. As a result, D3 had no notice of the plaintiffs' unregistered interest on the two lots. The plaintiffs are Singaporeans and do not reside on the land.

[37] It is D3's stand that they are a subsequent purchaser in good faith for valuable consideration. This court in *CIMB Bank Bhd v. AmBank (M) Bhd & Ors* [2017] 9 CLJ 145 has held that a chargee, having acquired an interest in the land is a purchaser within the meaning of the proviso of s. 340(3) of the NLC. Therefore, D3, a chargee is a subsequent purchaser in the present appeal. Even the Court of Appeal in para. 46 of its judgment acknowledged the fact that the chargee (D3) is a subsequent purchaser. The issue is to what extent is good faith measured on the part of D3, the chargee, which we will address later in this judgment.

[38] It is undisputed that D3 had disbursed the term loan to D2, hence there is valuable consideration. "Valuable consideration" was defined by the House of Lords in *Midland Bank Trust Co Ltd v. Green* [1981] AC 513 as:

> ... an expression denoting an advantage conferred in detriment suffered.

[39] In the present appeal, even assuming for a moment that the transfer of the two lots from D1 to D2 is impugned, the charge should remain valid and intact because D3's title as a subsequent (as opposed to immediate) purchaser is indefeasible under the proviso to s. 340(3) of the NLC, if it can prove *bona fide* and valuable consideration.

[40] The impact of the decision of the Court of Appeal has imposed a commercially unrealistic burden on the financial institutions to prove good faith under the proviso to s. 340(3) of the NLC, as evident from the decision of the Court of Appeal in paras. [46] and [47] which we had alluded to, in the earlier paragraphs of this judgment. The focus of the issue in this appeal is, to what extent is good faith and/*bona fide* required of a subsequent purchaser within the meaning of proviso to s. 340(3) of the NLC, which is the focus in answering question 4. We will answer the rest of the questions after question 4 as it forms the main issue in this appeal.

Question 4

[41] Question 4 requires this court to determine which of the conflicting decisions prevails, in the case of *Bayangan Sepadu Sdn Bhd v. Jabatan Pengairan Dan Saliran Negeri Selangor & Ors* [2022] 2 CLJ 1; [2022] 1 MLJ 701 and *Au Meng Nam & Anor v. Ung Yak Chew & Ors* [2007] 4 CLJ 526; [2007] 5 MLJ 136 as to measuring the extent of good faith and/or *bona fide* required of a purchaser within the meaning of s. 340(3) of the NLC.

[42] Counsel for the plaintiffs submitted that the case of *Bayangan Sepadu* is not applicable to the present appeal as the facts of that case can be distinguished because it involves a judicial sale, namely that the subsequent purchaser purchased the property at a bidding in an auction sale under a proclamation of sale. Hence, the position of a successful bidder of a judicial sale is different from that of a subsequent purchaser as envisaged by s. 340(3) of the NLC. It was also submitted that the Federal Court there, did not discuss the question of *bona fide* or good faith. The plaintiffs submitted that even in *Bayangan Sepadu*, the Federal Court still went through all the documents outside the register of title to determine whether what the respondent said in that case was true or not. The Federal Court there found that the evidence did not corroborate the respondent's case.

[43] However, we are not persuaded by the argument of counsel for the plaintiffs in this respect for the following reasons.

[44] Firstly, counsel for the plaintiffs missed the crucial point, namely, the effect of registration of one's title on the register of title and the principle of indefeasibility of title under ss. 89 and 340(1) of the NLC. In our present appeal, it is D2 who is the registered proprietor of the two lots. Plaintiffs' interest is unregistered. Neither was there any encumbrance endorsed on the register nor caveat lodged on the lots at the time when the search by D3 was made on the lots before the creation of the charge.

[45] Secondly, although this court in *Bayangan Sepadu* did not use the word "good faith", it did address the acts of the purchaser, namely the steps taken by the appellant therein (the purchaser) in its best endeavour by conducting several land searches on the property at the land office before and after bidding for the land and the results of the searches revealed that there was no encumbrance endorsed on the register document of title of the land. It was only after the land had been purchased by the appellant and the appellant engaged a licensed surveyor to survey the land, it was discovered that there is a retention pond on the said land and other permanent structures built surrounding the land, being 9.554 acres out of 17.49 acres. It was alleged by the respondent that there was a surrender of part of the land for the retention pond and the structures to the authorities, however, these were held by this court to be a non-valid surrender as it was not registered on the title of the land. Although the appellant therein did not inspect the land before bidding

at an auction, this court held that even if such an inspection had occurred and discovered that a big portion of the land was covered with the retention pond and the structures, the ownership on the register document of title as revealed in the land searches remained unchanged, namely, the portion of the land with the retention pond and the structures which was the alleged surrender to the state authority was unregistered in the register of title. Consequently, the purchaser having diligently conducted multiple land searches both prior to and after the bidding, which revealed no encumbrance endorsed on the register document of title of the land, obtained an indefeasible title to the land (refer to para. 37 of the judgment of *Bayangan Sepadu*). This court also held that:

> [1] The principle of indefeasibility of title was one of the main features and attributes of the Torrens System of conveyance. It involved the proposition that once a person was registered as proprietor of certain land or interest in the land, he or she acquired a title that could not be vitiated except as provided under section 340 of the NLC. In the premises, a successful bidder at a public auction conducted under the NLC obtained an indefeasible title to the subject property and *the unregistered interest was not protected under the NLC. Every dealing or transaction of a land by a party whose interest was unregistered in the register of document could not defeat the title of the registered proprietor* …
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> …
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> [38] The evidence adduced before the High Court showed that the appellant had used its best efforts by conducting several land searches on the property at the Land Office before and after bidding for it and *the results of the searches revealed that there was no encumbrance endorsed on the register of title of the land.* In our view the efforts on the part of the appellant should be considered *from an objective point of view, namely what would a reasonable and prudent person have done to achieve the desired result, ie, whether the land had been surrendered by the previous owner to the State Authority.* (emphasis added)

[46] What can be discerned from *Bayangan Sepadu* is that every dealing or transaction of land by a party whose interest is unregistered in the register of documents cannot defeat the title of the registered proprietor. Datuk Professor Ahmad Ibrahim and Judith Sithombing in "*The Centenary of the Torrens System in Malaysia*" (MLJ, 1989) at p. 2 said that:

> Indefeasibility is the key principle of the Torrens system. Under it a title is made conclusive on registration subject however to statutory exceptions., so that the State guarantees that the title is unimpeachable. The Privy Council described this concept in *Fraser v. Walker* to the effect that indefeasibility: is a convenient description of the immunity from attack by adverse claims to the land or interest in respect of which he is registered, which a registered proprietor enjoys. The concept is central of registration …

Indefeasibility is obtained by the registration of a dealing, recognized by the relevant land legislation, in accordance with the form and procedure provided by that legislation ...

[47] This court made it clear as to the effect of s. 89 of the NLC in *Pushpaleela R Selvarajah & Anor v. Rajamani Meyappa Chettiar & Other Appeals* [2019] 3 CLJ 441; [2019] 2 MLJ 553 when it held that the effect of registration is to defeat all prior and subsequent unregistered claims. Richard Malanjum FCJ (as he then was) held that:

[7] That the trend *favors bona fide subsequent purchasers for value in all jurisdictions applying the Torrens system* has been aptly summarized as follows in *Baalman, The Singapore Torrens System* at p 86:

> *The Torrens System of land registration is predominantly a purchaser's system. Its aim is to facilitate the transfer of land as a commercial commodity by removing most of the risks of financial loss which beset purchasers under the general law.*

[8] Basically under the Torrens *System the land register is conclusive evidence of the description of the land. A third-party conducting an inquiry of the land need not go beyond the register to ensure that the land he or she is about to purchase is not fraught with encumbrances* ... (emphasis added)

Azhar Mohamed FCJ (as he then was) further held in *Pushpaleela* that:

[146] ... once the scheme of the provisions of s. 89 is seen, it is apparent that *since the register document of title is conclusive evidence of ownership and in the present instance since the register document of title bears the name of the first defendant as the registered proprietor, it follows and becomes conclusive evidence that the first defendant is the registered proprietor unless defeasible pursuant to s. 340 of the NLC.* What appears on the registered document of title is conclusive as the register is everything under the Torrens System in *Gibbs v. Messor & C*o [1891] AC 248, Lord Watson said:

> The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that *everyone who purchases, in bona fide and for value, from registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title.*

[147] In the case of *Teh Bee v. K Maruthamuthu* [1977] CLJU 134; [1977] 1 LNS 134; [1977] 2 MLJ 7, it was held that "the fact that the register document of title was in the name of the appellant was conclusive evidence that the title to the land was vested in the appellant." The concept of indefeasibility of title under s. 89 of the NLC applies to the person whose name currently appears as the proprietor on the register of title and not to a former registered proprietor (see *Yap Ham Seow*). (emphasis added)

[48] Teo Keang Sood and Khaw Lake Tee in *Land Law in Malaysia, Cases and Commentary* (3rd edn) at pp. 182 to 183 commented that:

> Under the Torrens system, it is the act of registration that vests title or interest; once registered, the title or interest cannot be divested except otherwise statutorily provided. Registration is the cornerstone of the Torrens system. It is not a system of registration or recordation of title, under which what are registered are existing titles or interests; registration under such system does not vest or divest any title or interest. Under the Torrens system the registered title or interest is also free of all adverse claims or encumbrances not otherwise noted on the register. *The effect of registration is to defeat all prior and subsequent unregistered claims.* Under this system, and as underscored by section 89 of the Code, the register is all important and conclusive evidence that the title is vested in the person or body for the time being named as the proprietor and that the land is subject to such conditions, restrictions in interest and other provisions as specified in the title. Theoretically, this is known as the "indefeasibility of title", which is reflected in *section 340 of our Code under which it is provided that registration confers an indefeasibility title or interest until and unless that title or interest is challenged or set aside on any of the grounds set out under section 340(2).* (emphasis added)

[49] *Teh Bee v. K Maruthamuthu* [1977] CLJU 134; [1977] 1 LNS 134; [1977] 2 MLJ 7 held the oft-quoted mantra that "Under the Torrens system the register is everything."

[50] Before *Bayangan Sepadu*, this court had also adopted a similar approach in *See Leong Chye & Anor v. United Overseas Bank (Malaysia) Bhd* [2021] 6 CLJ 650; [2021] 5 MLJ 759, whereby Vernon FCJ in his judgment held that:

> [37] ... The register document of title is accessible to the public in order to enable the public to conduct land searches at the land registry. *The words "indefeasibility of title or interest" in the Torrens system connotes the measure of conclusiveness given to a title or interest* in alienated land on registration of the dealing in statutory form. A title or interest is registered, it cannot be set aside except otherwise statutorily provided under sub-s 340(2) of the NLC ... *The register is everything* in the sense that the register document of title is conclusive evidence of entries thereon (see s. 89 of the NLC).
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> ...
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> [65] ... *The NLC is based on the Torrens land administration system which is a system of titles and interests by registration under which the register is conclusive or as some would put it – the register of titles is everything* (see s. 89 of the NLC; *Teh Bee v. K Marumuthu* [1977] CLJU 134; [1977] 2 MLJ 7) ... *persons need not be concerned to ascertain the validity of the information pertaining to the land as indicated on the register and the circumstances under which such proprietor came to be registered.* (emphasis added)

[51] This court in the aforesaid cases upheld the conclusiveness of the register document of title which does not require any person dealing with the land to go behind the register document of title to investigate or to ascertain the validity of the title. It is our judgment that this is the correct position of the law.

[52] Similarly in the present appeal, the learned High Court Judge and the Court of Appeal had erroneously assumed that the second SPA in which the two lots were transacted, was on the basis that they were empty lands, and that if D3 had visited the lots, it would know that the lots are not empty and had been occupied by the deceased and the deceased's beneficiaries for more than half a century. However, a perusal of the second SPA did not indicate that the lands were empty. Clause 15 of the same described the property amongst others as "... the property is sold subject to all rights and other easements and to all roads, back lanes and other improvements or schemes whatever affecting the same. The purchaser will be deemed to have inspected the property and will be deemed to have notice in all respects of the actual state and condition of the property sold and will take the property as it is."

[53] In any event, even if the two lots were not inspected by D3, it is inconsequential, because it does not change the fact that D2 is the registered proprietor on the register document of title while the plaintiffs are not. *Bayangan Sepadu* had addressed a similar issue in para. [47] when this court held:

> [47] In this instant appeal, we observed that the appellant did not inspect the site based on the statement given by PW 1 that the appellant's agent only informed the appellant about the auction a day before it. Nevertheless, even if the appellant takes steps to inspect the site and later discovered that big portion of the land was covered with the retention pond and the structures, the ownership on the paper (register document of title) as revealed in the land searches conducted by the appellant remains unchanged ...

[54] On the issue of "good faith", the Federal Court decision in *Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors* [1998] 1 CLJ 793; [1998] 1 MLJ 465 established the basic element of good faith as "the absence of fraud, deceit or dishonesty and the knowledge or means of knowledge of such at the time of entry into a transaction." In 2018, the Federal Court in *T Sivam Tharamalingam v. Public Bank Bhd* [2018] 6 CLJ 1; [2018] 5 MLJ 711 provided that the existence of good faith or otherwise depends on the particular facts of the case; it is a question of fact for the court to determine on the evidence. *T Sivam* referred to *Datuk Jaginder Singh & Ors v. Tara Rajaratnam* [1983] CLJU 21; [1983] 1 LNS 21; [1983] 2 MLJ 196 and *Au Meng Nam* and held that:

(i) good faith does not mean an absence of fraud, deceit or dishonesty. It also requires acting honestly, reasonably and fairly;

(ii) it is insufficient for a purchaser to merely show an absence of fraud, deceit or dishonesty; knowledge of a dispute as to the ownership of property and knowledge of fraud allegation; for example, could vitiate good faith;

(iii) a purchaser in good faith did not include a purchaser who is careless or who has been negligent; and

(iv) the elements of good faith are not closed. It must, in all cases, depend upon the circumstances.

[55] In the appeal before us, the Court of Appeal apparently relied on the sentiment expressed by the Court of Appeal in the case of *Au Meng Nam & Anor v. Ung Yak Chew & Ors* [2007] 4 CLJ 526; [2007] 5 MLJ 136, which were subsequently adopted by the Federal Court in *T Sivam Tharamalingam v. Public Bank Bhd,* and *Liputan Simfoni Sdn Bhd v. Pembangunan Orkid Desa Sdn Bhd* [2019] 1 CLJ 183; [2019] 4 MLJ 141, to hold that an obligation was imposed on the subsequent purchaser to go behind the land register to investigate the underlying transaction in order to qualify as purchaser in good faith.

[56] In the present appeal, the Court of Appeal failed to appreciate the facts in *Au Meng Nam* and the context in which the decision was made. *Au Meng Nam* concerned with an immediate purchaser (refer to para. 35 of the judgment of *Au Meng Nam*), unlike our present appeal where D3 is a subsequent purchaser. Hence s. 340(3) of the NLC has no application in *Au Meng Nam*, as that section refers to subsequent purchaser and not immediate purchaser. In any event, the determination of the "*bona fide*" issue in *Au Meng Nam* was based on the facts surrounding the case (as evident from paras. [41] to [44] of the said judgment). The approach by the Court of Appeal in *Au Meng Nam* which held that a purchaser in good faith does not include a purchaser who is careless or negligent, ought to be construed to apply to the peculiar facts of *Au Meng Nam*. Raus Sharif JCA (as he then was) held after considering the facts of the case in *Au Meng Nam* said that:

> [42] Had the learned trial judge taken the above facts and circumstances into consideration he cannot possibly conclude that the 1st defendant was a *bona fide* purchaser for valuable consideration so as to be protected under s 340(3) of the Code. To me the 1st defendant had acted hastily. **He concluded the sale without proper investigation into the title or the persons claiming to be proprietors** ...
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> [43] Further, had the evidence adduced in this case properly considered and assessed by the trial Judge, a reasonable inference would be that the 1st defendant knew that at the time he bought the said land, **the purchase price was below the market value.** But he wanted to take advantage of the low price. **He did a fast track to complete the purchase. In so doing, he disregarded his obligations to investigate the alleged proprietors and genuineness of the documents** ... A purchaser in good faith does not include a purchaser who is careless or who had been negligent.
>
> (emphasis added)

[57] Similarly in *T Sivam* which referred to and adopted *Au Meng Nam*, Azhar Mohamed FCJ (as he then was) in making a determination on the element of carelessness and negligence which negated good faith on the part of the defendant therein, premised the aforesaid findings on the peculiar facts of that case. This is evident from the judgment which states:

> [90] In the face of *the suspicious and uncertain circumstances under which the transaction was transacted,* still the defendant proceeded to disburse the loan to Nagarajan and *created the charge on the land without making further inquiries. Courts would be slow to assist chargee who failed to take ordinary precautions that ought to be undertaken before registering the charged land and as such are not entitled to the protection of the court.* As observed by Fry J in *Kettlewell v. Watson*, 'The Court will not allow a man to avail himself of a legal estate which he has recovered, or of the right which he may have under a registered conveyance, knew a fact which made it unconscionable for him to take the legal estate or to effect the registration. *On the facts of the present case, in our judgment, the element of 'carelessness and negligence' also negated good faith on the part of the defendant.* (emphasis added)

[58] In other words, *T Sivam* and *Liputan Simfoni* appear to have preferred the broader concept of good faith as laid down in *Au Meng Nam*, namely to discharge the burden of showing that it is a purchaser in good faith and valuable consideration to seek protection under the proviso of s. 340(3) of the NLC, the purchaser must not only show the absence of fraud, deceit or dishonesty but also that it had taken the ordinary precautions that a reasonably prudent purchaser would have taken in the circumstances. Special emphasis on the statement that the question of whether a purchaser has acted as a reasonable prudent purchaser or not would have to be decided on the particular facts of the case (Refer to para. 74 of *Liputan Simfoni*'s judgment).

[59] From the sentiment as expressed, by relying on *Au Meng Nam*, it would also appear that a subsequent purchaser who is not tainted by the fraud or forgery would not be deemed a *bona fide* purchaser for good value if he was negligent or careless. This manner of interpretation of the proviso may lead to uncertainty in land dealings and run against the very grain and primary intent of the Torrens system, which is to provide certainty and security of titles and interests once acquired and registered.

[60] There are two distinctive critical features in the Torrens system of land registration, upon which our NLC was premised on, namely:

(v) all major dealings concerning any land as to ownership, transfer of ownership, lease, charge, easement, *etc*, must be registered in a central register kept by the State Authority; and

(vi) such a registered dealing is conferred, by law, the status of indefeasibility.

[61] The intended effect of these two features is to ensure that the public has access to this register. From this, derived the two principles, namely the "mirror principle" and the "curtain principle". By the "mirror principle", anyone who inspects the register for the status of the land will be able to rely on the integrity of the register, namely what is recorded in the register are the correct particulars concerning the land and what is not recorded in the register cannot affect the land, legally. By the "curtain principle", the dispensation of the need to look beyond the register, as the register itself provides all relevant information reflecting the validity of the same.

[62] It is our judgment that *Au Meng Nam* should be taken in its proper context, namely that it was decided based on its own set of facts. Raus Sharif and Hasan Lah JJCA (as they then were) in the Court of Appeal in *Au Meng Nam* took a cautious approach to prevent injustice, as at that point in time, they were bound by the decision of the Federal Court in *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133; [2001] 1 MLJ 241 before it was overruled by the Federal Court in *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269; [2010] 2 MLJ 1. The panel was not prepared to disregard the decision of *Adorna Properties* as that would be against *stare decisis* (refer to paras. 31 to 35 of the judgment). They were trying to dispense justice in granting relief without going against the decision of *Adorna Properties Sdn Bhd*. Hence, the panel decided to distinguish *Au Meng Nam* on its facts.

[63] Be that as it may, it is pertinent to note that, the facts in *Au Meng Nam* (as outlined in paras. 41 to 44 of the said judgment), by any objective standard, would arouse suspicion of any reasonable man. There was a failure on the part of the purchaser in making enquiries, like the relevant searches and getting proper identification documents from the vendors, who only possessed temporary identity cards when the sale and purchase agreement was signed. The purchaser's lawyers testified that they could not do the relevant searches or queries because the purchaser insisted on hurrying through to conclude the transaction on the same day. The transaction was done in a rush. If fraud under s. 340(2)(a) NLC could have been ascribed to him, then he would come within that subsection which would render his title defeasible.

[64] Given the aforesaid, it is our judgment that *Au Meng Nam* (which was adopted in *T Sivam* and *Liputan Simfoni*) ought not to be taken as authority for the blanket proposition that carelessness or negligence negates good faith under the proviso to s. 340(3) of the NLC. The reason is this. This court should uphold the conclusive nature of the register document of titles and as far as our present appeal is concerned, because of the conclusive nature of the register of titles (whereby D2 is the registered proprietor), there was no legal duty on the chargee, D3 to carry out inspection of the property prior to accepting the charge. The chargee was entitled to rely on the register. Even if the chargee did not carry further enquiries prior to the creation of the

charge, at most what can be said of the D3 is that, they have been negligent in not carrying out further enquiries but negligence *per se* does not and cannot amount to fraud, as the register of title disclosed that D2 was the registered owner and there was no encumbrance on the land and there was no fraud in the present appeal. Under the Torrens system, the register is everything. By accepting and imposing a blanket proposition that carelessness or negligence negates good faith under the proviso to s. 340(3) of the NLC, would tantamount to undermining the very intent and purpose of the Torrens system, namely to give certainty to the register as reflecting the correct particulars on legally recognised land dealings in land matters.

[65] In addition, s. 340(3) of the NLC would not apply in *Au Meng Nam* as the case concerned an immediate purchaser. Even if it did, he could not fall within the definition of a *bona fide* purchaser, as he was a party or privy to the fraud as interpreted by Lord Lindley in *Assets Company v. Mere Roihi* [1905] AC 176, at p. 210 which had been adopted over and over again by this court where, Lord Lindley articulated that:

> fraud means actual fraud, *ie*, dishonesty of some sort, not what is called constructive or equitable fraud. The fraud which must be proved in order to invalidate the title of a registered proprietor for value must be brought home to the person whose registered title is impeached or its agents. *The mere fact that he might have found out fraud if he had been more vigilant, and had made further enquiries, which he omitted to make, does not by itself prove fraud on his part. But if it were shown that he abstained from making enquiries for fear of learning the truth, the case is very different and fraud may be properly ascribed to him.* A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be genuine document which can be properly acted upon. (emphasis added)

[66] The rationale as stated by Lord Lindley as aforesaid ought to be the correct approach, so as to align the facts of *Au Meng Nam* within the definition of fraud under s. 340(2)(a) of the NLC. However, one cannot widen the scope of the duty imposed on the subsequent purchaser to enable to seek the protection under the proviso of s. 340(3), in the manner alluded to, by the Court of Appeal at paras. 46 and 47 in their judgment.

[67] The effect of the Court of Appeal's decision in the present appeal had unduly imposed a heavy burden on financial institutions to go behind every individual sale and purchase transaction to examine and investigate the sale and purchase documentation between the vendor and the purchaser, namely between D1 and D2. In the present appeal, contemporaneous documents clearly showed that the sale and purchase transaction between D1 and D2 had been completed, and the register document of title clearly shows that the title of the property has been transferred to D2 free from encumbrances with the consent of the vendor.

[68] It is not in dispute that D3 had no notice of the plaintiffs' unregistered claim. The Supreme Court in *Lian Keow Sdn Bhd (In Liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] CLJU 44; [1988] 1 LNS 44; [1988] 2 MLJ 449 through the judgment of Syed Agil Barakbah SCJ has held that mere knowledge of an unregistered interest is insufficient to constitute fraud and there is no duty to make further inquiries. What more in our case there was not even notice or knowledge of the unregistered interest of the plaintiffs.

[69] The Court of Appeal held that even if D3 would have no notice of the deceased's interest, it does not automatically allow D3 to assume the legitimacy and validity of the transaction between D1 and D2 under the second SPA. It remains incumbent upon D3 to examine the second SPA between D1 and D2 even if there was no notice at all of the deceased's interest from the face of the title (refer to para. 48 of the Court of Appeal judgment).

[70] Essentially, the decision of the Court of Appeal in the present appeal has introduced the English equitable doctrine of notice/doctrine of constructive notice (under the deed system) into the NLC (which employs the Torrens system). It is trite that the English equitable doctrine of notice/ doctrine of constructive notice has no application under the provisions of the NLC.

[71] The present system of land tenure provided for in the NLC is that all lands alienated by the state are held under the Torrens system (refer to Teo KS & Khaw LT, *Land Law in Malaysia* ((1965) 2nd edn Butterworths, p. 7). The intent of the Torrens system is to provide a reliable and efficient framework for registration of interests in lands, thereby simplifying the process of land transactions and create a more commercially friendly environment. Hence, under the Torrens system a purchaser is not to be affected by the English equitable doctrine of notice. "Any knowledge of an existing trust interest or unregistered interest shall not by itself and without any evidence of moral turpitude on the part of the purchaser, be imputed as fraud" (refer to SY Kok inthe textbook, *The Torrens System and Equitable Principles*).

[72] Under the deeds system (as opposed to the Torrens system), a purchaser would have to search through and get to the origin of the title or interest before purchasing the deed. The deed system did not guarantee a secured title and proved to be expensive, inefficient, and slow. Land dealings under the Torrens system must be recorded in a register which can be inspected by the public to satisfy themselves of the title, interest and encumbrance to the land, if any. The register is meant to be the mirror of the title deeds, containing all the information one needs to know on a particular piece of land. Unlike the deed system, this could only be

discovered after a long drawn out enquiry. Under the Torrens system, no dealing in land under it, is recognised as valid unless and until it is registered. Although once registered the title becomes indefeasible, there are however exceptions, which are clearly provided for, under the same section.

[73] Section 6 of the Civil Law Act 1956 provides that the English law relating to any immovable property is not applicable in Malaysia. For clarity, we reproduced the said section:

> 6. Nothing in this Part shall be taken to introduce into Malaysia or any of the States comprised therein any part of the law of England relating to the tenure or conveyance or assurance of or succession to any immovable property or any estate, right or interest therein.

[74] As stated by the learned author, SY Kok in the textbook, *The Torrens System and Equitable Principles* (preface ix):

> *... that a Torrens Law purchaser is not to be affected by the English equitable doctrine of notice and that any knowledge of an existing trust interest or unregistered registrable interest shall not, of itself and without additional evidence of moral turpitude on the part of the purchaser, be imputed as fraud;* section 43 INSW) or s. 47 (Singapore). *The English element of notice was deliberately left out and not enacted in the proviso of s. 340(3) (NLC).* The statutory exoneration of a Torrens law purchaser from the effect of the common law doctrine of notice operates only during the pre-registration stage of the Torrens System. The reason for this is simple: *a Torrens law purchaser will remain in the pre-registration stage of the Torrens process of registered conveyancing; if registration is achieved, that purchaser's status crystallises into one that exists upon and after registration, that is, a newly created registered proprietor who steps into the shoes of his corresponding vendor whose existing title has been divested upon registration.* The exoneration of a Torrens law purchaser from the effect of notice provision is, therefore, design to protect that envisaged purchaser from being deprived of a purchased title or a registered interest just because of knowledge of a pre-existing claim (equitable interest) against a vendor's or chargor's registered statutory title. Off course this provision does not apply when a purchaser is guilty. (emphasis added)

[75] There is thus no place for the English equitable doctrine of notice to apply against a subsequent purchaser under s. 340(3) of the NLC in the absence of fraud, deceit or dishonesty, given the conclusiveness of the register document of title as provided in the same, and the clear and deliberate omission of the element of notice (which would otherwise be relevant under the UK deed system) from the proviso to s. 340 of the NLC.

[76] Gill CJ (Malaya) in *Doshi v. Yeoh Tiong Lay* [1974] CLJU 30; [1974] 1 LNS 30; [1975] 1 MLJ 85 rejected constructive notice/knowledge under the Torrens system when His Lordship pronounced:

A It is contended for the appellant that if the respondent had knowledge by his agent of the illegality of the loan transaction and consequently of the transfer by Chooi Mun Sou to the Nominee Company being void, he cannot be a bona fide purchaser. The authority relied on for this contention is the old case of *Le Neve v. Le Neve* (1747) Amb 436 26 ER 1172. *But the doctrine of constructive notice, which is all that the respondent can be said* B *to have had in this case, is inapplicable, as a rule, to systems of registration in relation to transaction where priority and notice are governed by priority in or the fact of registration. (See 14 Halsbury, 3rd Edition para 1023 p 545). Where the effect of constructive notice would be to invalidate a transaction in relation to sale of land, the court will not readily apply the doctrine (See 14 Halbury, 3rd Edition p 545).* (emphasis added)

C

[77] The objective of the Torrens system is to do away from the complicated system of rules in England that regulate the dealings in land, particularly those relating to matters such as notice of encumbrances and trusts (refer to *T Damodaran v. Choe Kuan Him* [1979] CLJU 107; [1979] 1 LNS 107; [1979] 2 MLJ 267).

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[78] This court in *Tai Lee Finance Co Sdn Bhd v. Official Assignee & Ors* [1983] 1 CLJ 183; [1983] CLJ (Rep) 387; [1983] 1 MLJ 81 (Tab 28, ABOA) held that the proof of constructive notice on the part of the chargee of the purchasers' rights was insufficient to constitute the actual fraud required E under s. 340 NLC. Despite the absence of an equivalent 'exoneration from notice' provision such as is found in the New Zealand and Australian Torrens statutes, the Federal Court held that a similar principle would apply under the National Land Code, namely that mere knowledge of the existence of an unregistered interest would not of itself be regarded as fraud within the F meaning envisaged by s. 340 of the NLC.

[79] The legal principle laid down in the foregoing authorities can also be seen in the case of *Than Kok Leong v. Low Kim Hai* [1983] 1 CLJ 95; [1983] CLJ (Rep) 907; [1983] 1 MLJ 187 where it was expressly held that the equitable doctrine of constructive notice as found in the English Law, has no G application in land dealings in Malaysia.

[80] The same judicial trend was adopted in the cases of *Eng Mee Yong & Ors v. V Letchumanan* [1979] CLJU 18; [1979] 1 LNS 18; [1979] 2 MLJ 212 (Tab 30, ABOA), *Holee Holdings (M) Sdn Bhd v. Chai Him & Ors* [1997] CLJU 424; [1997] 1 LNS 424; [1997] 4 MLJ 601 (Tab 31, ABOA), *Ong Ban* H *Chai & Ors v. Seah Siang Mong* [1998] 3 CLJ 637; [1998] 3 MLJ 346 (Tab 32, ABOA), *Zainal Abidin Mohamed v. Roslan Abdul Aziz & Anor* [2003] 7 CLJ 132; [2003] MLJU 367 and *Score Option Sdn Bhd v. Mexaland Development Sdn Bhd* [2012] 7 CLJ 802; [2012] 6 MLJ 475.

I **[81]** The decision of the Court of Appeal has created uncertainty in financing transactions using land as collateral. Premised on the Court of Appeal decision, a financier must prove that it would have been "impossible" to discover any unlawfulness after carrying out a critical

examination of concluded transactional documents which the financier is not privy to. We agree with D3's counsel submission that to impose such a requirement would be impractical and counterproductive, creating significant obstacles for financial institutions and more importantly, undermining the efficiency and reliability of the register under the Torrens system.

[82] Instead of being able to confidently rely on the conclusiveness of the land register, the financier must now conduct substantive meticulous investigations into the underlying transactions of the land despite the land register reflecting ownership and the absence of encumbrance on the land. Banking and finance businesses using land as collateral will thereby be rendered impracticable and burdensome, in particular when it comes to financing a development project which involves hundreds of land titles (as in the present case). It would be a huge burden and cumbersome on the bank to go behind every individual sale and purchase transaction to examine and investigate the sale and purchase documentation between the vendor and the purchaser, when the contemporaneous documents clearly showed that the sale and purchase transaction had been completed and the register document of title clearly shows that the title of property has been transferred to the purchaser free from encumbrances with the consent of the vendor. To ensure that the lands could be validly charged and the term loan could be disbursed to D2, D3 appointed Messrs Yeow & Salleh to handle the loan documentation and the creation of the charge over the lands. Messrs Yeow & Salleh had taken the necessary due diligence steps to verify and confirm that the lands could be validly charged to D3, namely:

(i) conducting searches with CCM on D1 and D2;

(ii) conducting winding up searches on D1 and D2;

(iii) conducting bankruptcy search on the directors of D2;

(iv) conducting land searches on the lands dated 26 June 2019 which showed that the lands were free from encumbrances; and

(v) obtaining confirmation from D2's solicitors Messrs Han & Partners that the purchase price of the lands had been fully settled by D2 together with proof of payment and certified true copies of the directors' resolutions of D1 and D2 to dispose of the titles in the SPA transaction;

[83] D2 expressly represented to D3 that D2 had paid the purchase price for the lands and was the registered and beneficial owner of the land. There were documents and testimony evidencing the payment of the purchase price by D2 and the registration of charge on the lands. These efforts, in our view, show that D3 had used its best efforts by conducting several land searches on the property at the land office and the results of the searches revealed that there was no encumbrance endorsed on the register of title of the land. In our

A view the efforts on the part of D3 should be considered from an objective point of view, namely, what would a reasonable and prudent person have done to achieve the desired result, namely that D2 is the registered owner of the land and that there was no encumbrance on the land.

B **[84]** The approach taken by the Court of Appeal in this appeal means that a potential purchaser of land will have to trace all previous transactions of the land and to ensure that all the factors affecting these previous transactions are valid and cannot be impugned, despite registered title has been issued. A subsequent purchaser must conduct inquiries and checks on the validity of every single transaction since the registered title was issued to determine C the proper provenance of the land.

[85] From the facts of the present appeal, objectively, there was nothing that would arouse suspicion on the part of D3 that D2 did not pay for the lands (although unpleaded), unlike the facts as in *Au Meng*, *T Sivam* or *Liputan Simfoni*.

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[86] Hence it is our judgment that the Court of Appeal had erred when it held that although D3 has no notice of or knowledge of any impropriety of the plaintiffs' unregistered interest in the lands, D3 should go beyond the register document of title and the sale and purchase transaction to which D3 E was not a party, to ascertain the propriety of the sales and purchase agreement between D1 and D2.

[87] Given the aforesaid, the case of *Bayangan Sepadu Sdn Bhd v. Jabatan Pengairan Dan Saliran Negeri Selangor & Ors* [2022] 2 CLJ 1; [2022] 1 MLJ 701 (Tab 17, ABOA) is the correct decision in measuring the extent of good F faith and/or *bona fide* required of a purchaser within the meaning of the proviso to s. 340(3) of the NLC.

Question 1: Where There Is Contractual Representation That The Chargor Is The Legal And Beneficial Owner Of The Property And There Is No Notice Of Any Adverse Claim To The Property, Whether It Is Incumbent On The Bank To G *Investigate If There Is Any Illegality Attached To The Underlying Sale And Purchase Agreement, Failing Which The Bank Cannot Qualify As A Bona Fide Purchaser Under The Proviso To s. 340(3) Of The National Land Code?*

[88] It is undisputed that:

H (i) contractually it has been represented that D2 is the legal and beneficial owner of the lots;

(ii) D2 is the registered owner of the land in the register; and

(iii) there was no notice of any adverse claim to the lots nor caveat on the same before the creation of the charge in favour of D3.

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[89] Caveats serve as a substitute for the equitable doctrine of notice under the English land law (See *Eng Mee Yong & Ors v. V Letchumanan* [1979] CLJU 18; [1979] 1 LNS 18; [1972] 2 MLJ 212 at p. 214). By s. 322(2) of the NLC, the effect of the entry of caveats binds the land itself to prevent any registered disposition of the land except with the caveator's consent until the caveat is removed. In the present appeal, there was no such caveat on the lots as the first plaintiff's private caveat on the land was withdrawn about four years before the lots were sold and transferred to D2. Neither should a duty be imposed on D3 to investigate as to why the private caveat had been withdrawn, particularly if withdrawn years ago.

[90] At all material times, there was not an iota of evidence to suggest that D3 possessed or could have reasonably acquired notice of any irregularities in the sale and purchase transaction between D1 and D2, to which D3 was never a party nor privy to. Whether the lands are empty lands or otherwise, is inconsequential, as it does not change the ownership of the land title.

[91] Hence, it is not incumbent for D3 to investigate nor enquire if there is any illegality attached to the underlying sale and purchase agreement between D1 and D2, after carrying out various due diligence steps before releasing the term loan to D2 and the creation of charge in favour of D3.

[92] Given the aforesaid, we answered Question 1 in the negative.

Question 2: In Order To Qualify As A Subsequent Purchaser In Good Faith Under The Proviso To s. 340(3) Of The National Land Code, Whether The Bank Must Clearly Show That It Was Impossible For The Bank To Have Known Of The Unlawfulness Of The Sale And Purchase Transaction Even After Proper Examination And Verification Of The Sale And Purchase Agreement Documents Between The Vendor And The Chargor?

[93] We have alluded in the previous paragraphs in this judgment that, in the absence of any notice of actual fraud, deceit or dishonesty of D3, D3 was not obliged to investigate the underlying sale and purchase transaction between D1 and D2, given that D2 is the registered proprietor on the register of title, and there is no encumbrance on the land.

[94] It is against the intent and purport of the Torrens system and impractical, to require D3 to clearly show that it was "impossible" for D3 to have known of the unlawfulness of the sale and purchase transaction even after proper examination and verification of the sale and purchase agreement documents between the vendor and the chargor. This requirement would create an unnecessary burden on the part of D3 and would affect the banking industry as a whole.

[95] The requirement as imposed by the Court of Appeal is unreasonably high and difficult to attain. Such a requirement also renders the registration of title meaningless, as a financing institution is expected to doubt/second guess the validity of a registered title and to conduct investigations into concluded transactions which the financing institution is not privy to.

[96] We answered Question 2 in the negative.

Question 3: In Order To Qualify As A Subsequent Purchaser In Good Faith Under The Proviso To s. 340(3) Of The National Land Code, Whether The Bank Must Critically Look Into The Documentation, Transactional Documents (Payments And Receipts) Leading Up To The Sale And Purchase Of The Properties Even Though The Sale And Purchase Transaction Has Been Completed And Title Transferred And Registered In The Name Of The Chargor Free From Encumbrances Prior To The Creation Of The Charge With The Consent Of The Vendor?

[97] In the present appeal, the plaintiff contends that D1, as a bare trustee, had no right to transfer the lots to D2. Consequently, D2 had no right to accept the transfer or charge the lots to D3, the bank.

[98] There was no allegation pleaded by the plaintiffs of any wrongdoing by D2 or D3, nor did they plead/nor allege that the transfer of the lands to D2 should be nullified due to non-payment by D2. It was only as a last minute attempt by the plaintiffs when they inserted allegations of non-payment of the purchase price by D2 and fraud against D3 in the witness statements filed for the trial. Although the issue of non-payment by D2 was unpleaded and it was raised as an afterthought at the submission stage after trial, the High Court and the Court of Appeal went on to address and consider the unpleaded allegations (paras. 99 to 107 of the High Court judgment, paras. 51 and 52 of the Court of Appeal judgment).

[99] Notwithstanding the aforesaid, Messrs Han & Partners, the solicitors for D2 had represented to D3's solicitors that the purchase price had been fully paid. Neither was there any suggestion that D3 was made aware of any alleged failure of D2 to pay the full purchase price to D1.

[100] In addition, the plaintiffs did not argue any exception to the indefeasibility of title under s. 340(2) of the NLC or suggest that D3, the bank was aware of any defect in the titles.

[101] Although the plaintiffs claimed that their deceased father bought the two lots from D1 in 1967 and 1968, there was no effort to have their interests registered or initiate any action against D1 for specific performance, throughout these years. Hence, the plaintiffs' interest remained unregistered. The effect of an unregistered interest of the plaintiffs led to the D3 relying on the conclusiveness of the register which reflects that D2 is the registered owner of the lands. Similarly, in *Bayangan Sepadu*, the alleged surrender of the land for the retention pond and the structures to the state authorities were held by the court to be a non-valid surrender and neither was it registered on the title of the land. Hence, the appellant therein has indefeasibility of title to the whole land. The register document of title is conclusive evidence of ownership and the respondent's unregistered interest cannot defeat the indefeasible interest of the registered chargee and correspondingly the indefeasible interest of the successful bidder under the auction.

[102] D2 and its solicitors had represented to D3's solicitors that the purchase price had been fully paid. The sale and purchase transaction of the lots between D1 and D2 has been completed and the title was transferred and registered without encumbrance, way before the term loan was disbursed by D3. Given the aforesaid, D3, the bank should not be obligated to further scrutinise the transactional documents to qualify as a subsequent purchaser in good faith under s. 340(3) of the NLC.

[103] We answered Question 3 is in the negative.

Question 5: Whether The Burden Of Proving Valuable Consideration Of A Subsequent Purchaser Under The Proviso To s. 340(3) Of The National Land Code Extends To Proving That Valuable Consideration Has Passed Between The Immediate Purchaser And The Vendor?

[104] The proviso to s. 340(3) of the NLC protects the title of a subsequent purchaser in good faith and for valuable consideration. This means that for the indefeasibility of title to be maintained, there must be valuable consideration between D2 and the subsequent purchaser (D3, the bank).

[105] However, the Court of Appeal ruled that D3 must also demonstrate that valuable consideration passed from D2 to the vendor (D1), thereby imposing a burden beyond what s. 340(3) of the NLC requires. It is unwarranted to restrict the scope of s. 340(3) in such a manner.

[106] D3 should not be required to prove the passage of valuable consideration between the immediate purchaser and the vendor, beyond the confirmation received from the D2's solicitors. The requirement to seek additional documentation, such as proper accounts and receipts of payment, is also unnecessary and places an undue burden on *bona fide* subsequent purchaser, given that D2 is registered as the proprietor on the register of title.

[107] As the charge was acquired by D3 as a purchaser in good faith and for valuable consideration. D3 should be accorded the protection of the proviso to s. 340(3) of the NLC.

[108] We answered Question 5 in the negative.

Conclusion

[109] It is our judgment that the Court of Appeal in deciding against D3/appellant, had erred when it contradicted settled principles of land law under the Torrens system, namely a register document of title is conclusive evidence of ownership which defeats all prior unregistered claims thus avoiding the need for one dealing with the land to go behind the registered document of title to investigate and ascertain the validity of the said title.

[110] In the premises, we allowed the appeal with costs of RM50,000 here and below to be paid to D3/appellant subject to allocator. Accordingly, we set aside the decision of the High Court and the Court of Appeal.